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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

ROBERT LESLIE HINDS,)	
)	
Petitioner,)	CIV 09-01340 PHX FJM (MEA)
)	
v.)	REPORT AND RECOMMENDATION
)	
CHARLES RYAN, ARIZONA ATTORNEY)	
GENERAL,)	
)	
Respondents.)	
_____)	

TO THE HONORABLE FREDERICK J. MARTONE:

Petitioner filed this action on June 22, 2009. Respondents filed an Answer to Petition for Writ of Habeas Corpus ("Answer") on October 23, 2009. See Docket No. 18. Petitioner filed a reply to the answer on or about November 20, 2009. See Docket No. 20.

I Background

On January 20, 2006, Petitioner and two co-defendants were indicted on one count of possession of marijuana for sale, one count of sale or transportation of marijuana, and possession of drug paraphernalia. See Answer, Exh. B. Petitioner was tried before a jury along with his two co-defendants. See id., Exh. A. Petitioner and his co-defendants were convicted of all counts set forth in the indictment. Id., Exh. A.

1 Petitioner was sentenced to mitigated concurrent terms
2 of four years imprisonment pursuant to his conviction for
3 possession of marijuana for sale and sale or transportation of
4 marijuana. Id., Exh. C. Petitioner was sentenced to a
5 consecutive term of three years probation pursuant to his
6 conviction for possession of drug paraphernalia. Id., Exh. C.

7 Petitioner filed a timely direct appeal of his
8 convictions and sentences. In his direct appeal Petitioner
9 asserted the trial court abused its discretion by denying a
10 pretrial motion to suppress evidence, arguing there was a lack
11 of reasonable suspicion and that Petitioner had been unlawfully
12 detained. Id., Exh. D. Petitioner also argued his rights to
13 due process and confrontation were violated because the trial
14 court did not sever his trial from that of his co-defendants.
15 Id., Exh. D. Additionally, in his direct appeal Petitioner
16 argued the trial court abused its discretion by denying his
17 motion for a mistrial based upon prosecutorial misconduct. See
18 id., Exh. D.¹

19 The Arizona Court of Appeals affirmed Petitioner's
20 convictions and sentences in a memorandum decision issued
21 October 7, 2008. See id., Exh. E. Petitioner sought review of
22 this decision by the Arizona Supreme Court, which summarily
23

24 ¹The factual basis asserted for the claim of prosecutorial
25 misconduct was the prosecutor's question to a detective, i.e., whether
26 the defense was allowed to ask a case agent to analyze the evidence
27 sitting on the table in the courtroom during the trial. Petitioner's
28 counsel argued in his direct appeal that the trial court's denial of
a mistrial after this question was asked improperly shifted the burden
of proving innocence to Petitioner. Answer, Exh. D.

1 denied review on May 7, 2009. Id., Exh. G.

2 Petitioner did not file any action for state post-
3 conviction relief pursuant to Rule 32, Arizona Rules of Criminal
4 Procedure.

5 In his federal habeas petition, Petitioner asserts he
6 is entitled to relief because:

7 1. The Arizona Court of Appeals refused to address his
8 Fourth Amendment claim of illegal search and seizure.

9 2. The police violated Petitioner's Fourth Amendment
10 right to be free from an unlawful stop and unlawful seizure.

11 3. The trial court violated Petitioner's Sixth
12 Amendment right to a fair trial by failing to sever the trial of
13 Petitioner from his co-defendants.

14 4. His Sixth Amendment rights to a fair trial were
15 violated because of prosecutorial misconduct.

16 Respondents contend Petitioner's first, second, and
17 fourth claims for relief are procedurally defaulted.
18 Respondents also assert Petitioner's third claim for relief
19 should be denied on the merits.

20 **II Analysis**

21 **A. Exhaustion and procedural default**

22 The District Court may only grant federal habeas relief
23 on the merits of a claim which has been exhausted in the state
24 courts. See O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S.
25 Ct. 1728, 1731 (1999); Coleman v. Thompson, 501 U.S. 722, 729-
26 30, 111 S. Ct. 2546, 2554-55 (1991). To properly exhaust a
27 federal habeas claim, the petitioner must afford the state the

1 opportunity to rule upon the merits of the claim by "fairly
2 presenting" the claim to the state's "highest" court in a
3 procedurally correct manner. See, e.g., Castille v. Peoples,
4 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989); Rose
5 v. Palmateer, 395 F.3d 1108, 1110 (9th Cir. 2005).²

6 The Ninth Circuit Court of Appeals has concluded that,
7 in non-capital cases arising in Arizona, the "highest court"
8 test of the exhaustion requirement is satisfied if the habeas
9 petitioner presented his claim to the Arizona Court of Appeals,
10 either on direct appeal or in a petition for post-conviction
11 relief. See Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir.
12 1999). See also Crowell v. Knowles, 483 F. Supp. 2d 925, 932
13 (D. Ariz. 2007) (providing a thorough discussion of what
14 constitutes the "highest court" in Arizona for purposes of
15 exhausting a habeas claim in the context of a conviction
16 resulting in a non-capital sentence).

17 To satisfy the "fair presentment" prong of the
18 exhaustion requirement, the petitioner must present "both the
19 operative facts and the legal principles that control each claim
20 to the state judiciary." Wilson v. Briley, 243 F.3d 325, 327
21 (7th Cir. 2001). See also Kelly v. Small, 315 F.3d 1063, 1066
22 (9th Cir. 2003). In order to fulfill exhaustion requirements,
23

24 ² Prior to 1996, the federal courts were required to dismiss
25 a habeas petition which included unexhausted claims for federal habeas
26 relief. However, section 2254 now states: "An application for a writ
27 of habeas corpus may be denied on the merits, notwithstanding the
28 failure of the applicant to exhaust the remedies available in the
courts of the State." 28 U.S.C. § 2254(b)(2) (1994 & Supp. 2009).

1 a petitioner must present to the state courts the "substantial
2 equivalent" of the claim presented in federal court. Picard v.
3 Connor, 404 U.S. 270, 278, 92 S. Ct. 509, 513-14 (1971);
4 Libberton v. Ryan, 583 F.3d 1147, 1164 (9th Cir. 2009).

5 In Baldwin v. Reese, the Supreme Court reiterated
6 that the purpose of exhaustion is to give the states the
7 opportunity to pass upon and correct alleged constitutional
8 errors. See 541 U.S. 27, 29, 124 S. Ct. 1347, 1349 (2004).
9 Therefore, if the petitioner did not present the federal habeas
10 claim to the state court as asserting the violation of a
11 specific federal constitutional right, as opposed to violation
12 of a state law or a state procedural rule, the federal habeas
13 claim was not "fairly presented" to the state court. See, e.g.,
14 id., 541 U.S. at 33, 124 S. Ct. at 1351.

15 Full and fair presentation requires a petitioner to
16 present the substance of his claim to the state courts,
17 including a reference to a federal constitutional guarantee and
18 a statement of facts that entitle the petitioner to relief. See
19 Scott v. Schriro, 567 F.3d 573, 582 (9th Cir.), cert. denied, 78
20 U.S.L.W. 3360 (Dec. 14, 2009); Lopez v. Schriro, 491 F.3d 1029,
21 1040 (9th Cir. 2007). Although a habeas petitioner need not
22 recite "book and verse on the federal constitution" to fairly
23 present a claim to the state courts, Picard, 404 U.S. at 277-78,
24 92 S. Ct. at 512-13, they must do more than present the facts
25 necessary to support the federal claim. See Anderson v.
26 Harless, 459 U.S. 4, 6, 103 S. Ct. 276, 277 (1982).

1 A federal habeas petitioner has not exhausted a federal
2 habeas claim if he still has the right to raise the claim "by
3 any available procedure" in the state courts. 28 U.S.C. §
4 2254(c) (1994 & Supp. 2009). Because the exhaustion requirement
5 refers only to remedies still available to the petitioner at the
6 time they file their action for federal habeas relief, it is
7 satisfied if the petitioner is procedurally barred from pursuing
8 their claim in the state courts. See Woodford v. Ngo, 548 U.S.
9 81, 92-93, 126 S. Ct. 2378, 2387 (2006). If it is clear the
10 habeas petitioner's claim is procedurally barred pursuant to
11 state law, the claim is exhausted by virtue of the petitioner's
12 "procedural default" of the claim. See, e.g., id., 548 U.S. at
13 92, 126 S. Ct. at 2387.

14 Procedural default occurs when a petitioner has never
15 presented a federal habeas claim in state court and is now
16 barred from doing so by the state's procedural rules, including
17 rules regarding waiver and the preclusion of claims. See
18 Castille, 489 U.S. at 351-52, 109 S. Ct. at 1060. Procedural
19 default also occurs when a petitioner did present a claim to the
20 state courts, but the state courts did not address the merits of
21 the claim because the petitioner failed to follow a state
22 procedural rule. See, e.g., Ylst v. Nunnemaker, 501 U.S. 797,
23 802, 111 S. Ct. 2590, 2594-95 (1991); Coleman, 501 U.S. at 727-
24 28, 111 S. Ct. at 2553-57; Szabo v. Walls, 313 F.3d 392, 395
25 (7th Cir. 2002). "If a prisoner has defaulted a state claim by
26 'violating a state procedural rule which would constitute
27 adequate and independent grounds to bar direct review ... he may

1 not raise the claim in federal habeas, absent a showing of cause
2 and prejudice or actual innocence.'" Ellis v. Armenakis, 222
3 F.3d 627, 632 (9th Cir. 2000), quoting Wells v. Maass, 28 F.3d
4 1005, 1008 (9th Cir. 1994).

5 Because the Arizona Rules of Criminal Procedure
6 regarding timeliness, waiver, and the preclusion of claims bar
7 Petitioner from now returning to the state courts to exhaust any
8 unexhausted federal habeas claims, Petitioner has exhausted, but
9 procedurally defaulted, any claim not previously fairly
10 presented to the Arizona Court of Appeals in his direct appeal.
11 See Insyxiengmay v. Morgan, 403 F.3d 657, 665 (9th Cir. 2005);
12 Beaty v. Stewart, 303 F.3d 975, 987 (9th Cir. 2002). See also
13 Stewart v. Smith, 536 U.S. 856, 860, 122 S. Ct. 2578, 2581
14 (2002) (holding Arizona's state rules regarding the waiver and
15 procedural default of claims raised in attacks on criminal
16 convictions are adequate and independent state grounds for
17 affirming a conviction and denying federal habeas relief on the
18 grounds of a procedural bar); Ortiz v. Stewart, 149 F.3d 923,
19 931-32 (9th Cir. 1998).

20 **B. Cause and prejudice**

21 "Cause" is a legitimate excuse for the petitioner's
22 procedural default of the claim and "prejudice" is actual harm
23 resulting from the alleged constitutional violation. See Thomas
24 v. Lewis, 945 F.2d 1119, 1123 (9th Cir. 1991). To demonstrate
25 cause, a petitioner must show the existence of some external
26 factor which impeded his efforts to comply with the state's
27 procedural rules. See Vickers v. Stewart, 144 F.3d 613, 617

1 (9th Cir. 1998); Martinez-Villareal v. Lewis, 80 F.3d 1301, 1305
2 (9th Cir. 1996). To establish prejudice, the petitioner must
3 show that the alleged constitutional error worked to his actual
4 and substantial disadvantage, infecting his entire trial with
5 constitutional violations. See Vickers, 144 F.3d at 617;
6 Correll, 137 F.3d at 1415-16. Establishing prejudice requires
7 a petitioner to prove that, "but for" the alleged constitutional
8 violations, there is a reasonable probability he would not have
9 been convicted of the same crimes. See Manning v. Foster, 224
10 F.3d 1129, 1135-36 (9th Cir. 2000); Ivy v. Caspari, 173 F.3d
11 1136, 1141 (8th Cir. 1999). Although both cause and prejudice
12 must be shown to excuse a procedural default, the Court need not
13 examine the existence of prejudice if the petitioner fails to
14 establish cause. See Engle v. Isaac, 456 U.S. 107, 134 n.43,
15 102 S. Ct. 1558, 1575 n.43 (1982); Thomas, 945 F.2d at 1123
16 n.10.

17 **C. Fundamental miscarriage of justice**

18 Review of the merits of a procedurally defaulted habeas
19 claim is required if the petitioner demonstrates review of the
20 merits of the claim is necessary to prevent a fundamental
21 miscarriage of justice. See Dretke v. Haley, 541 U.S. 386, 393,
22 124 S. Ct. 1847, 1852 (2004); Schlup v. Delo, 513 U.S. 298, 316,
23 115 S. Ct. 851, 861 (1995); Murray v. Carrier, 477 U.S. 478,
24 485-86, 106 S. Ct. 2639, 2649 (1986). A fundamental miscarriage
25 of justice occurs only when a constitutional violation has
26 probably resulted in the conviction of one who is factually
27 innocent. See Murray, 477 U.S. at 485-86, 106 S. Ct. at 2649;

1 Thomas v. Goldsmith, 979 F.2d 746, 749 (9th Cir. 1992) (showing
2 of factual innocence is necessary to trigger manifest injustice
3 relief). To satisfy the "fundamental miscarriage of justice"
4 standard, a petitioner must establish by clear and convincing
5 evidence that no reasonable fact-finder could have found him
6 guilty of the offenses charged. See Dretke, 541 U.S. at 393,
7 124 S. Ct. at 1852; Wildman v. Johnson, 261 F.3d 832, 842-43
8 (9th Cir. 2001).

9 **D. Petitioner's claims for relief**

10 **1. Petitioner contends he is entitled to habeas relief**
11 **because the Arizona Court of Appeals refused to address his**
12 **Fourth Amendment claim of illegal search and seizure.**

13 A federal court may not grant habeas relief
14 to a state prisoner unless the prisoner has
15 first exhausted his state court remedies. See
16 28 U.S.C. § 2254(b)(1). A petitioner
17 satisfies the exhaustion requirement by fully
18 and fairly presenting each claim to the
19 highest state court. A petitioner fully and
20 fairly presents a claim to the state courts
21 if he presents the claim (1) to the correct
22 forum, see § 2254(c); (2) through the proper
vehicle, ; and (3) by providing the factual
and legal basis for the claim. Full and fair
presentation additionally requires a
petitioner to present the substance of his
claim to the state courts, including a
reference to a federal constitutional
guarantee and a statement of facts that
entitle the petitioner to relief.

23 Scott, 567 F.3d at 582 (internal citations omitted).

24 In Petitioner's direct appeal, the Arizona Court of
25 Appeals did not examine his claim that the stop of his vehicle
26 and his arrest was a violation of his Fourth Amendment rights.
27 The Court of Appeals noted Petitioner had not raised the issue,

1 arguing instead in his direct appeal that the trial court abused
2 its discretion by denying a pre-trial motion to suppress
3 evidence. The state Court of Appeals did not consider the claim
4 now asserted as a basis for habeas relief because Petitioner
5 failed to properly raise the issue in his direct appeal.
6 Accordingly, the merits of the claim were not addressed because
7 of Petitioner's failure to follow state procedural rules of
8 appeal. Petitioner, therefore, procedurally defaulted this
9 federal habeas claim in the state courts and the District Court
10 may not grant relief on the merits of the claim absent a showing
11 of cause and prejudice or a fundamental miscarriage of justice.
12 See Cook v. Schriro, 538 F.3d 1000, 1025-26 (9th Cir. 2008).

13 To constitute an adequate and independent state
14 procedural ground sufficient to support a state court's finding
15 of procedural default, "a state rule must be clear, consistently
16 applied, and well-established at the time of [the] petitioner's
17 purported default." Lambright v. Stewart, 241 F.3d 1201, 1203
18 (9th Cir. 2001). A state rule is considered consistently
19 applied and well-established if the state courts follow it in
20 the "vast majority of cases." Scott, 567 F.3d at 580, quoting
21 Dugger v. Adams, 489 U.S. 401, 417 n.6, 109 S. Ct. 1211, 1221
22 n.6 (1989). The Ninth Circuit Court of Appeals has held that
23 "federal courts should not insist upon a petitioner, as a
24 procedural prerequisite to obtaining federal relief, comply[]
25 with a rule the state itself does not consistently enforce."
26 Id., 567 F.3d at 581-82, quoting Siripongs v. Calderon, 35 F.3d
27 1308, 1318 (9th Cir. 1994). It is Respondents' burden to prove

1 the rule cited and relied upon by the state court in denying
2 relief was clear, consistently applied, and well-established at
3 the time the rule was applied to Petitioner's case. Id.

4 Additionally, for the proffered state procedural bar to
5 preclude the consideration of a habeas claim "the state court
6 must actually have relied on the procedural bar as an
7 *independent basis* for its disposition of the case." Caldwell v.
8 Mississippi, 472 U.S. 320, 327, 105 S. Ct. 2633, 2638-39 (1985)
9 (emphasis added). See also Harris v. Reed, 489 U.S. 255,
10 261-62, 109 S. Ct. 1038, 1042 (1989).

11 "[A] procedural default does not bar
12 consideration of a federal claim on either
13 direct or habeas review unless the last state
14 court rendering a judgment in the case
15 clearly and expressly states that its
16 judgment rests on a state procedural bar."
17 Harris, 489 U.S. at 263, 109 S. Ct. 1038 [].
... Sanders v. Cotton, 398 F.3d 572, 580 (7th
Cir. 2005) (where the state appellate court's
discussion of waiver is intertwined with its
merits analysis, the state court's decision
does not rest on an independent and adequate
state law ground)....

18 Pole v. Randolph, 570 F.3d 922, 937 (7th Cir. 2009) (some
19 internal citations and quotations omitted). See also Scott, 567
20 F.3d at 581-82.

21 In Petitioner's direct appeal the Arizona Court of
22 Appeals stated: "On appeal, defendant challenges only the
23 admissibility of evidence flowing from the traffic stop; he does
24 not argue that Defendant's Fourth Amendment rights were
25 violated by the search and seizure of the boxes. Therefore, we
26 do not address this issue." The state appellate court then
27 reviewed the trial court's decision denying Petitioner and a co-

1 defendant's pretrial motion to suppress evidence seized
2 thereafter and found no error in the trial court's decision.
3 Answer, Exh. A.

4 There is no evidence before this Court that the state
5 rule followed by the Court of Appeals was not clear,
6 consistently applied, and well-established at the time the rule
7 was applied to Petitioner's case. Accordingly, there is an
8 adequate and independent state law basis for the state court's
9 decision declining to consider the merits of this claim.
10 Because, as explained infra, Petitioner has not established
11 cause and prejudice for his procedural default, the District
12 Court may not grant relief on the merits of the claim.

13 **2. Petitioner asserts his convictions and sentences**
14 **must be reversed because the police violated Petitioner's Fourth**
15 **Amendment right to be free from an unlawful stop and an unlawful**
16 **arrest.**

17 Petitioner is precluded from federal habeas relief on
18 the basis of any alleged violation of the Fourth Amendment.
19 Petitioner's Fourth Amendment claim is not cognizable in an
20 action for federal habeas relief because he had the opportunity
21 to litigate this claim in the state courts. See Stone v.
22 Powell, 428 U.S. 465, 494, 96 S. Ct. 3037, 3052 (1976).

23 A claim that the petitioner's Fourth Amendment rights
24 were violated does not provide a basis for granting federal
25 habeas relief from a state conviction if the petitioner had the
26 opportunity "for full and fair litigation" of the claim in the
27 state courts. See, e.g., Woolery v. Arave, 8 F.3d 1325, 1326-27

1 (9th Cir. 1993); Patterson v. Runnels, 288 F. Supp. 2d 1092,
2 1097-98 (C.D. Cal. 2003). The relevant inquiry is whether the
3 petitioner was afforded a full and fair hearing of his claim in
4 the state court, not whether the state court reached a correct
5 decision regarding the legitimacy of the "search." See
6 Ortiz-Sandoval v. Gomez, 81 F.3d 891, 899 (9th Cir. 1996);
7 Siripongs v. Calderon, 35 F.3d 1308, 1321 (9th Cir. 1994).

8 Petitioner had a full and fair opportunity to litigate
9 this claim in the state courts. Petitioner joined a co-
10 defendant's pretrial motion to suppress evidence arising from
11 their seizure from a vehicle and the search of the boxes
12 containing marijuana Petitioner tried to ship via DHL. The
13 motion to suppress was denied.

14 Additionally, in his direct appeal, Petitioner asserted
15 that the trial court erred by denying the motion to suppress,
16 arguing in his direct appeal that his Fourth Amendment rights
17 were violated by the traffic stop and his seizure. The Court of
18 Appeals denied this claim in Petitioner's direct appeal.
19 Petitioner could have asserted in his direct appeal that the
20 search of the boxes violated his Fourth Amendment rights, but
21 did not raise this claim in his direct appeal. Furthermore,
22 Petitioner could have filed a state action for post-conviction
23 relief, asserting that his appellate counsel was ineffective for
24 failing to raise a Fourth Amendment claim regarding the search
25 of the boxes.

26 Petitioner had a full and fair opportunity to raise his
27 Fourth Amendment claims in the Arizona state courts. Therefore,

1 the District Court may not grant habeas relief on the merits of
2 this claim.

3 **3. Petitioner maintains he was denied his Sixth**
4 **Amendment right to a fair trial was violated because the trial**
5 **court denied his motion to sever the trial of Petitioner and his**
6 **co-defendants.**

7 Prior to trial Petitioner's counsel filed a motion to
8 sever Petitioner's trial from that of his co-defendants.
9 Counsel argued the defendants intended to present inconsistent
10 defenses, i.e., to argue that the others were guilty.
11 Petitioner contends denial of the motions to sever was error
12 because "it was never proven that all three men knew equally"
13 that marijuana was being shipped. Petitioner contends that,
14 because he was the only defendant to testify at their trial, his
15 co-defendants' counsel were allowed to cross-examine him and to
16 argue that Petitioner "was the person responsible for the entire
17 operation to ship drugs."

18 Petitioner raised this claim in his direct appeal and,
19 accordingly, the claim was properly exhausted. The Court of
20 Appeals determined that the defenses of the co-defendants were
21 not mutually exclusive and that a joint trial did not prejudice
22 Petitioner. The Court of Appeals also found the "jury in this
23 case could have believed that none of the defendants knew what
24 was in the packages, all of them knew, or any combination
25 thereof." See Answer, Exh. A at 13. The appellate court
26 pointed out that, "to justify severance, antagonistic defenses
27 must be mutually exclusive; that is 'in order to believe the

1 core of the evidence offered on behalf of one defendant, [the
2 jury] must disbelieve the core of the evidence offered on behalf
3 of the co-defendant'". Id., Exh. A at 14, citing Arizona v.
4 Cruz, 137 Ariz. 541, 545, 672 P.2d 470, 474 (1983).

5 The Arizona Court of Appeals further determined there
6 was no "rub-off" effect on Petitioner, caused by evidence
7 implicating his co-defendants. The appellate court reasoned
8 that "the jury could clearly differentiate between the
9 complained-of evidence implicating Garrison and Gomez and the
10 evidence that implicated [Petitioner], namely, the marijuana,
11 paraphernalia, and money discovered in [Petitioner]'s
12 apartment." Id., Exh. A at 16. The state appellate court noted
13 the evidence introduced at trial that

14 in [Petitioner]'s wallet was discovered
15 information on how to open a DHL account,
16 including references to "Ricardo Burke" and
17 the non-existent business "Teflon Close Line"
18 that was listed as the shipper on the boxes,
19 [and also that the] police found a letter
from DHL to Ricardo Burke in [Petitioner]'s
apartment bearing the apartment's address.
Finally, [Petitioner] was observed carrying
out of stores items typically used for
packing and shipping illegal drugs.

20 Id., Exh. A at 16.

21 The state court of appeals also determined any
22 prejudice suffered by Petitioner as a result of the denial of
23 the motion to sever was minimized by the trial court twice
24 instructing the jury that "[e]ach defendant is entitled to have
25 the jury determine the verdict as to each of the crimes charged
26 based upon the defendant's own conduct and from the evidence
27 that applies to that defendant as if the defendant were being
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1 tried alone." Id., Exh. A at 16-17.

2 The joint trial of defendants indicted together does
3 not violate the United States Constitution unless "mutually
4 antagonistic" or "irreconcilable" defenses are so prejudicial to
5 a defendant as to mandate severance. See Zafiro v. United
6 States, 506 U.S. 534, 538, 113 S. Ct. 933, 937 (1993). The
7 Supreme Court has noted that "[m]utually antagonistic defenses
8 are not prejudicial per se." Id., 506 U.S. at 538, 113 S. Ct.
9 at 937. Severance is mandated only if there is a "serious risk
10 that a joint trial would compromise a specific trial right of
11 one of the defendants, or prevent the jury from making a
12 reliable judgment about guilt or innocence." Id., 506 U.S. at
13 539, 113 S. Ct. at 938.

14 To warrant habeas relief based on a claim the trial
15 court erred in refusing to sever a petitioner's trial, the
16 petitioner must establish that the state court's "denial of his
17 severance motion rendered his trial fundamentally unfair."
18 Grisby v. Blodgett, 130 F.3d 365, 370 (9th Cir. 1997). A trial
19 is rendered fundamentally unfair "if the impermissible joinder
20 had a substantial and injurious effect or influence in
21 determining the jury's verdict." Sandoval v. Calderon, 241 F.3d
22 765, 772 (9th Cir. 2000). Specifically, a petitioner must show
23 that prejudice arising from the failure to grant severance was
24 so "clear, manifest, and undue" that he was denied a fair trial.
25 Lambright v. Stewart, 191 F.3d 1181, 1185 (9th Cir. 1999).
26 Additionally, it "is well settled that defendants are not
27 entitled to severance merely because they may have a better
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1 chance of acquittal in separate trials." Zafiro, 506 U.S. at
2 540, 113 S. Ct. at 938-39.

3 Petitioner has failed to establish prejudice arising
4 from the denial of the motion to sever and has not met his
5 burden of demonstrating that the trial court's denial of the
6 motion to sever rendered his trial fundamentally unfair.

7 At trial, overwhelming evidence was presented
8 implicating Petitioner in the charged offenses. The jury was
9 informed that marijuana and drug paraphernalia, along with
10 approximately \$7,000, was found in Petitioner's apartment.
11 Evidence was introduced that, "in [Petitioner]'s wallet was
12 discovered information on how to open a DHL account, including
13 references to 'Ricardo Burke' and the non-existent business
14 'Teflon Close Line' that was listed as the shipper on the boxes"
15 of marijuana seized from the DHL office.

16 Petitioner's convictions were not based on the
17 conflicts between his defense and those of his co-defendants.
18 There is no evidence that not severing the trial was
19 fundamentally unfair, i.e., that it had a substantial and
20 injurious effect or influence in determining the jury's verdict.
21 Petitioner has not established that any prejudice arising from
22 the failure to grant severance was so "clear, manifest, and
23 undue" that he was denied a fair trial.

24 The Arizona Court of Appeals' determination that
25 Petitioner's federal constitutional rights were not violated by
26 denial of the motion to sever was neither contrary to, or an
27 unreasonable application of, clearly established federal law and
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was not based on an unreasonable determination of the facts in light of the evidence presented at trial. Accordingly, Petitioner is not entitled to federal habeas relief on this claim.

4. Petitioner contends he is entitled to habeas relief because his Sixth Amendment rights to a fair trial were violated by prosecutorial misconduct.

Petitioner asserts he was subjected to prosecutorial misconduct, citing seven separate alleged incidents of misconduct. However, in his habeas petition Petitioner does not ever assert the factual basis for a claim of prosecutorial misconduct which was alleged in his direct appeal. Accordingly, Petitioner procedurally defaulted the prosecutorial misconduct claim presented in his habeas petition and, absent a showing of cause and prejudice, the District Court should not consider the merits of the claim.

In his traverse to the answer to his petition with regard to his procedural default of his first claim for habeas relief, i.e., that his Fourth Amendment rights were violated, Petitioner asserts that the seizure of the boxes from the DHL facility and his being seized and taken into custody and held for one hour prior to being arrested violated his Fourth Amendment rights and that he raised this claim in his direct appeal. Petitioner contends that presenting his claim, rather than arguing his claim, is sufficient to satisfy exhaustion requirements.

1 Petitioner further asserts that he was denied his right
2 to present his Fourth Amendment claims to the Arizona Court of
3 Appeals. Petitioner alleges his rights were violated because
4 the boxes were removed from the DHL facility prior to being
5 examined by a drug-sniffing dog, when the dog could have been
6 transported to the DHL facility. Petitioner argues, at length,
7 that the search and seizure and search warrant involved in his
8 arrest were improper and in violation of federal law.

9 With regard to cause and prejudice from his procedural
10 default of his prosecutorial misconduct claims, Petitioner
11 contends the default was the result of ineffective assistance of
12 his appellate counsel, in addition to appellate counsel's
13 inadvertence and ignorance. Petitioner contends appellate
14 counsel's ineffectiveness may be imputed to the state because
15 counsel was appointed.

16 Petitioner has not established cause for his procedural
17 default of most of his federal habeas claims, including his
18 prosecutorial misconduct claim, in the state courts. Under the
19 "cause and prejudice" test, Petitioner bears the burden of
20 establishing that some objective factor external to the defense
21 impeded his compliance with Arizona's procedural rules. See
22 Moorman v. Schriro, 426 F.3d 1044, 1058 (9th Cir. 2005). To
23 establish prejudice, the petitioner must show that the alleged
24 error "worked to his actual and substantial disadvantage,
25 infecting his entire trial with error of constitutional
26 dimensions." United States v. Frady, 456 U.S. 152, 170, 102 S.
27 Ct. 1584, 1595 (1982). See also Correll v. Stewart, 137 F.3d

1 1404, 1415-16 (9th Cir. 1998).

2 Generally, a petitioner's lack of legal expertise is
3 not cause to excuse procedural default. See Hughes v. Idaho
4 State Bd. of Corr., 800 F.2d 905, 908 (9th Cir. 1986).
5 Additionally, allegedly ineffective assistance of appellate
6 counsel does not establish cause for the failure to properly
7 exhaust a habeas claim in the state courts unless the specific
8 Sixth Amendment claim providing the basis for cause was itself
9 properly exhausted. See Edwards v. Carpenter, 529 U.S. 446,
10 451, 120 S. Ct. 1587, 1591 (2000); Coleman, 501 U.S. at 755, 111
11 S. Ct. at 2567 ("We reiterate that counsel's ineffectiveness
12 will constitute cause only if it is an independent
13 constitutional violation"); Deitz v. Money, 391 F.3d 804, 809
14 (6th Cir. 2004) ("[a]ttorney error does not constitute cause to
15 excuse a procedural default unless counsel's performance was
16 constitutionally deficient."). Petitioner's assertion that,
17 because his appellate counsel was incompetent and appointed by
18 the state, ergo, counsel's failure may be imputed to the state
19 to establish cause, has been regularly rejected by the federal
20 courts. Cf. Cook, 538 F.3d at 1027 ("Examples of sufficient
21 causes include a showing that the factual or legal basis for a
22 claim was not reasonably available to counsel, or that some
23 interference by officials made compliance impracticable.").

24 Similarly, Petitioner has not established that a
25 fundamental miscarriage of justice will occur if the Court does
26 not consider the merits of his defaulted claims. To qualify for
27 the "fundamental miscarriage of justice" exception to the

1 procedural default rule, Petitioner must show that a
2 constitutional violation has "probably" resulted in the
3 conviction when he was "actually innocent" of the offenses
4 charged. See, e.g., id., 538 F.3d at 1028. "To be credible,
5 such a claim requires petitioner to support his allegations of
6 constitutional error with new reliable evidence-whether it be
7 exculpatory scientific evidence, trustworthy eye-witness
8 accounts, or critical physical evidence-that was not presented
9 at trial." Id. (internal quotations omitted).

10 **III Conclusion**

11 Petitioner procedurally defaulted all of his federal
12 habeas claims in the state courts except for his claim that the
13 trial court's denial of his motion to sever violated his federal
14 constitutional rights. Petitioner has not established cause
15 for, nor prejudice arising from his procedural default of these
16 claims and, accordingly, the District Court should not consider
17 the merits of the claims. The Arizona Court of Appeals'
18 determination that the denial of the motion to sever did not
19 violate Petitioner's federal constitutional rights was not
20 clearly contrary to, nor an unreasonable application of federal
21 law and, accordingly, Petitioner is not entitled to relief on
22 the merits of this claim.

23
24 **IT IS THEREFORE RECOMMENDED that** Mr. Hinds' Petition
25 for Writ of Habeas Corpus be **denied and dismissed with**
26 **prejudice.**

27 This recommendation is not an order that is immediately
28

1 appealable to the Ninth Circuit Court of Appeals. Any notice of
2 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
3 Procedure, should not be filed until entry of the district
4 court's judgment.

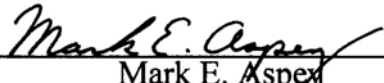
5 Pursuant to Rule 72(b), Federal Rules of Civil
6 Procedure, the parties shall have fourteen (14) days from the
7 date of service of a copy of this recommendation within which to
8 file specific written objections with the Court. Thereafter,
9 the parties have fourteen (14) days within which to file a
10 response to the objections. Pursuant to Rule 7.2, Local Rules
11 of Civil Procedure for the United States District Court for the
12 District of Arizona, objections to the Report and Recommendation
13 may not exceed seventeen (17) pages in length.

14 Failure to timely file objections to any factual or
15 legal determinations of the Magistrate Judge will be considered
16 a waiver of a party's right to de novo appellate consideration
17 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
18 1121 (9th Cir. 2003) (en banc). Failure to timely file
19 objections to any factual or legal determinations of the
20 Magistrate Judge will constitute a waiver of a party's right to
21 appellate review of the findings of fact and conclusions of law
22 in an order or judgment entered pursuant to the recommendation
23 of the Magistrate Judge.

24 Pursuant to 28 U.S.C. foll. § 2254, R. 11, the District
25 Court must "issue or deny a certificate of appealability when it
26 enters a final order adverse to the applicant." The undersigned
27 recommends that, should the Report and Recommendation be adopted
28

1 and, should Petitioner seek a certificate of appealability, a
2 certificate of appealability should be denied because Petitioner
3 has not made a substantial showing of the denial of a
4 constitutional right as required by 28 U.S.C.A § 2253(c)(2).³

5 DATED this 19th day of February, 2010.

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9 Mark E. Asper
10 United States Magistrate Judge
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20 A habeas petitioner's assertion of a claim must
21 make a substantial showing of the denial of a
22 constitutional right." Doe v. Woodford, 508 F.3d
23 563, 567 (9th Cir. 2007) (per curiam) (quoting
24 Hiivala v. Wood, 195 F.3d 1098, 1104 (9th Cir.
25 1999) (internal quotation marks omitted)). To
26 make this showing, [the petitioner] "must
demonstrate that the issues are debatable among
jurists of reason; that a court could resolve
the issues [in a different manner]; or that the
questions are adequate to deserve encouragement
to proceed further." Barefoot v. Estelle, 463
U.S. 880, 893 n. 4, 103 S. Ct. 3383, [] (1983)

27 Mendez v. Knowles, 556 F.3d 757, 770-71 (9th Cir.), cert. denied, 130
28 S. Ct. 509 (2009).